

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GINA L. BRITTON,

Plaintiff,

v.

MICHAEL ASTRUE, Commissioner of  
Social Security,<sup>1</sup>

Defendant.

No.: CV-11-314-EFS

**ORDER GRANTING DEFENDANT'S  
SUMMARY-JUDGMENT MOTION AND  
DENYING PLAINTIFF'S SUMMARY-  
JUDGMENT MOTION**

Before the Court, without oral argument, are two cross-summary-judgment motions. Plaintiff Gina L. Britton appeals the Administrative Law Judge's (ALJ) denial of benefits. ECF Nos. 10 & 15. Ms. Britton contends the ALJ erred because 1) she is more physically limited than the ALJ determined, as Dr. Frank McBarron's testimony and Dr. Sherry Wu's and ARNP Michael L. Keith's opinions revealed, and 2) the ALJ failed to include all of the limitations resulting from her fibromyalgia and migraine headaches into the hypothetical question posed to the

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<sup>1</sup> Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Federal Rule of Civil Procedure 25(d), Ms. Colvin is substituted for Michael J. Astrue as the Defendant in this lawsuit. No further action need be taken to continue this lawsuit. 42 U.S.C. § 405(g).

1 vocational expert. The Commissioner of Social Security ("Commissioner")  
2 asks the Court to affirm the ALJ's decision that Ms. Britton is capable  
3 of returning to her past relevant work. After reviewing the record and  
4 relevant authority the Court is fully informed. For the reasons set  
5 forth below, the Court affirms the ALJ's decision and therefore denies  
6 Ms. Britton's motion and grants the Commissioner's motion.

7 **A. Statement of Facts<sup>2</sup>**

8 Ms. Britton is a 40-year-old mother of two school-aged children.  
9 ECF No. 7 at 66, 195. Ms. Britton lives at home with her two children  
10 and her boyfriend, and she has primary responsibility for caring for the  
11 children and the house. *Id.* at 41-42, 64-67.

12 Ms. Britton has a high-school degree and attended college for two-  
13 and-a-half years, eventually becoming a certified medical assistant.  
14 *Id.* at 42. Ms. Britton last worked in 2005. *Id.* at 43. Prior to that  
15 date, Ms. Britton worked as a CNA in internal medicine (light work,  
16 skilled), phlebotomist (light work, semi-skilled), fast food worker  
17 (light work, unskilled), cook helper (light work, unskilled), sales  
18 clerk (light work, semi-skilled), animal caretaker (medium work, semi-  
19 skilled), bartender (medium work, semi-skilled), and waitress (light  
20 work, semi-skilled). *Id.* at 44-45, 82-83. Ms. Britton claims she is  
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25 <sup>2</sup> The facts are only briefly summarized. Detailed facts are  
26 contained in the administrative hearing transcript, the ALJ's decision,  
27 and the parties' briefs.

1 unable to be substantially gainfully employed due to her severe muscular  
2 pain and migraine headaches.

3 **B. Procedural History**

4 On May 3, 2007, Mr. Britton filed concurrent applications for  
5 Social Security Disability Insurance Benefits and Supplemental Security  
6 Income Benefits (hereinafter, "claim for benefits"), alleging an onset  
7 of disability beginning November 14, 2003, due to fibromyalgia,  
8 migraines, nausea, kidney disease, and generalized dystonia. ECF No. 7  
9 at 134-151, 197. Her claims for benefits were denied, *id.* at 94-100,  
10 and her request for reconsideration of that denial was denied, *id.* at  
11 105-11. Ms. Britton then requested an administrative hearing, which was  
12 held on December 12, 2008, before ALJ Gene Duncan. *Id.* at 112-13, 38-  
13 89. On October 23, 2009, the ALJ denied Ms. Britton's claim for  
14 benefits. *Id.* at 17-31. The Appeals Council thereafter denied Ms.  
15 Britton's request for review. *Id.* at 1-6.

16  
17 On November 3, 2011, Ms. Britton filed this lawsuit, claiming that  
18 the ALJ's decision is not supported by substantial evidence. ECF No. 4.  
19 On June 18, 2012, Ms. Britton filed her Motion for Summary Judgment, ECF  
20 No. 18, and on July 30, 2012, the Commissioner filed its Motion for  
21 Summary Judgment, ECF No. 20.  
22

23 **C. Disability Determination**

24 A "disability" is defined as the "inability to engage in any  
25 substantial gainful activity by reason of any medically determinable  
26 physical or mental impairment which can be expected to result in death  
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1 or which has lasted or can be expected to last for a continuous period  
2 of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A),  
3 1382c(a)(3)(A). The decision-maker uses a five-step sequential  
4 evaluation process to determine whether a claimant is disabled. 20  
5 C.F.R. §§ 404.1520, 416.920.

6 Step one assesses whether the claimant is engaged in substantial  
7 gainful activities. If she is, benefits are denied. 20 C.F.R. §§  
8 404.1520(b), 416.920(b). If she is not, the decision-maker proceeds to  
9 step two.  
10

11 Step two assesses whether the claimant has a medically severe  
12 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c),  
13 416.920(c). If the claimant does not have a severe impairment or  
14 combination of impairments, the disability claim is denied. If the  
15 impairment is severe, the evaluation proceeds to the third step.

16 Step three compares the claimant's impairment with a number of  
17 listed impairments acknowledged by the Commissioner to be so severe as  
18 to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404  
19 Subpt. P App. 1, 416.920(d). If the impairment meets or equals one of  
20 the listed impairments, the claimant is conclusively presumed to be  
21 disabled. If the impairment does not meet or equal one of the listed  
22 impairments, the evaluation proceeds to the fourth step.  
23

24 Step four assesses whether the impairment prevents the claimant  
25 from performing work he has performed in the past. This includes  
26 determining the claimant's residual functional capacity. 20 C.F.R. §§  
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1 404.1520(e), 416.920(e). If the claimant is able to perform her  
2 previous work, she is not disabled. If the claimant cannot perform this  
3 work, the evaluation proceeds to the fifth step.

4 Step five, the final step, assesses whether the claimant can  
5 perform other work in the national economy in view of her age,  
6 education, and work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f);  
7 see *Bowen v. Yuckert*, 482 U.S. 137 (1987).

8 The burden of proof shifts during this sequential disability  
9 analysis. The claimant has the initial burden of establishing a *prima*  
10 *facie* case of entitlement to disability benefits. *Rhinehart v. Finch*,  
11 438 F.2d 920, 921 (9th Cir. 1971). The claimant meets this burden if  
12 she establishes that a physical or mental impairment prevents her from  
13 engaging in her previous occupation. The burden then shifts to the  
14 Commissioner to show 1) the claimant can perform other substantial  
15 gainful activity, and 2) that a "significant number of jobs exist in the  
16 national economy" which the claimant can perform. *Kail v. Heckler*, 722  
17 F.2d 1496, 1498 (9th Cir. 1984). A claimant is disabled only if her  
18 impairments are of such severity that she is not only unable to do her  
19 previous work but cannot, considering her age, education, and work  
20 experiences, engage in any other substantial gainful work which exists  
21 in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

#### 24 **D. Standard of Review**

25 On review, the Court considers the record as a whole, not just the  
26 evidence supporting the ALJ's decision. See *Weetman v. Sullivan*, 877

1 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525,  
2 526 (9th Cir. 1980)). The Court upholds the ALJ's determination that  
3 the claimant is not disabled if the ALJ applied the proper legal  
4 standards and there is substantial evidence in the record as a whole to  
5 support the decision. *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir.  
6 1983) (citing 42 U.S.C. § 405(g)); *Browner v. Sec'y of Health & Human*  
7 *Servs.*, 839 F.2d 432, 433 (9th Cir. 1987) (recognizing that a decision  
8 supported by substantial evidence will be set aside if the proper legal  
9 standards were not applied in weighing the evidence and making the  
10 decision). Substantial evidence is more than a mere scintilla, *Sorenson*  
11 *v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a  
12 preponderance, *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir.  
13 1989); *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576  
14 (9th Cir. 1988). "It means such relevant evidence as a reasonable mind  
15 might accept as adequate to support a conclusion." *Richardson v.*  
16 *Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch  
17 inferences and conclusions as the [ALJ] may reasonably draw from the  
18 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293  
19 (9th Cir. 1965). If the evidence supports more than one rational  
20 interpretation, the Court must uphold the ALJ's decision. *Allen v.*  
21 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

#### 24 **E. Analysis**

25 Ms. Britton argues the ALJ failed to fully consider the medical  
26 evidence and opinions, particularly Dr. McBarron's testimony and Dr.  
27

1 Wu's and ARNP Michael L. Keith's opinions, and therefore the ALJ failed  
2 to reach the proper determination as to the level of impact that Ms.  
3 Britton's impairments have on her ability to work. Upon review of the  
4 entire record, the Court finds the ALJ's determination that Ms. Britton  
5 is not disabled is supported by substantial evidence.

6 Although Dr. McBarron testified that he believed Ms. Britton may  
7 suffer from a somatoform disorder or from fibromyalgia, he opined that  
8 Ms. Britton could perform light work notwithstanding her limitations.  
9 ECF No. 7 at 78. Because Dr. McBarron opined that Ms. Britton is  
10 capable of light work, the ALJ noted that he was giving "little weight  
11 to the statement by Dr. McBarron that the claimant's signs and symptoms  
12 equal listing requirements." *Id.* at 21. The ALJ's decision that Ms.  
13 Britton does not satisfy a specific listed impairment is not erroneous.  
14 Also, although both Dr. McBarron and Dr. Wu opined that Ms. Britton  
15 suffers from fibromyalgia, the Court finds that the ALJ's residual  
16 functional capacity assessment comports with the entire medical record,  
17 including Ms. Britton's migraine headaches.

18 The Court finds the ALJ also appropriately did not accept Michael  
19 Keith, ARNP as an acceptable medical source. The ALJ noted that, "Mr.  
20 Keith is not an acceptable medical source who can give a medical  
21 opinion." *Id.* at 28. There is no evidence that Mr. Keith worked under  
22 a physician's close supervision when caring for Ms. Britton.  
23 Accordingly, Mr. Keith does not qualify as a medically acceptable  
24 treating source. *See Molina v. Astrue*, 674 F.3d 1104 (9th Cir. 2012)

(finding that physician's assistant did not qualify as a medically acceptable treating source).

In summary, the Court finds the record contains substantial evidence from which the ALJ properly concluded, when applying the correct legal standards, Ms. Britton is not disabled.

**E. Conclusion**

For the above-given reasons, **IT IS HEREBY ORDERED:**

1. Ms. Britton's Motion for Summary Judgment, **ECF No. 10**, is **DENIED**.

2. The Commissioner's Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.

3. **JUDGMENT** is to be entered in the Commissioner's favor.

4. The case shall be **CLOSED**.

**IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and provide copies to counsel.

**DATED** this 2<sup>nd</sup> day of July 2013.

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s/ Edward F. Shea  
EDWARD F. SHEA  
Senior United States District Judge